IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 344 OF 1995

M/s. "Chik Wear"
A Partnership Firm
represented through its
partner & owner
Nanjibhai Khimaji Shah,
Age 55 years, Occ. Business,
R/o. 151/21, Ravivar Peth,
Solapur ...Appellant.

Versus

1. M/s. Parag Dresses,
a partnership firm
carrying business of Main
Bazar, Sangamner,
Dist. Ahmednagar.

2. Shri. Bipin B. Shah,
Aged about 40 years,
Occ. Business,
owner and partner of
respondent No.1 above
R/o. Main Bazar, Sangamner,
Dist. Ahmednagar.

3. The State of Maharashtra ...Respondents.

.....

Shri. Sanjeev P. Kadam, Adv. for the appellant.

None for respondent Nos. 1 and 2 though served

Shri. A.S. Shitole, A.P.P. for Respondent.

.....

CORAM: SMT. V.K. TAHILRAMANI, J.

DATED: 5TH NOVEMBER, 2004

ORAL JUDGMENT:-

1. Through this appeal, the appellant i.e. original complainant has challenged the judgment and order dated 3.5.1995 passed by the learned

J.M.F.C. Court No.2, Solapur in S.T.C. No. 592 of 1991. By the said judgment and order, the learned Magistrate acquitted the respondent Nos. 1 and 2 i.e. original accused Nos. 1 and 2 of the offence under Section 138 of Negotiable Instruments Act.

2. Briefly stated the case of the complainant is as under:-

. The complainant witness No.1 Nanjibhai Khimji Shah is a partner of registered partnership firm by name "Chik Wear". The business of the said firm is purchase and sale of clothes. The accused No.1 M/s. Parag Dresses is also a partnership firm and accused No.2 Mr. Bipin B. Shah is the partner of accused No.1 firm. As per the complainant, the accused No.2 is the owner of the said firm. The accused No.1 purchased goods from the complainant and towards the said purchase, accused issued cheque Nos.0002639 and 0002640 both dated 10.6.91 for Rs.3,000/- and Rs.2,000/- respectively drawn on Central Bank of India, Branch Sangamner. The said cheques were presented by the complainant to its Banker Canara Bank, Solapur. The said cheques were returned dishonoured for want of funds (exceeds arrangement) vide Banker memo dated 21.6.91 in respect of cheque of Rs.3,000/- and dated 25.6.91

in respect of cheque of Rs.2,000/-. Thereafter. the complainant issued notice dated 12.7.91 in respect of both the cheques through his advocate, which was received by the accused on 15.7.91. The accused neither replied to the notice nor paid the amount, hence, the complainant filed his complaint under Section 138 of Negotiable Instruments Act.

3. Process was issued against the accused and the substance of the accusation was explained to the accused. The plea of the accused came to be recorded. As per the complaint as accused No.1 i.e. partnership firm was represented through accused No.2 plea of accused No.2 only was recorded. The accused pleaded not guilty and claimed to be tried. The defence of the accused is that of total denial. It is the further defence of accused No.2 that he is neither the owner nor the partner of the firm Parag Dresses on whose behalf the cheques in question have been issued. The accused No.2 has further denied the issuance of cheques by him and his signature on cheques. He has further denied the receipt of notice for himself and on behalf of firm Parag Dresses.

4. During the course of trial, the complainant examined five witnesses. After going through all the evidence, the learned Magistrate acquitted the

accused of the offence charged. Hence, this appeal.

5. I have heard the learned advocate for the appellant and the learned A.P.P. for the state. None apepars for respondent Nos. 1 and 2. I have also perused the record pertaining to the present case. After carefully considering the matter, I am of the opinion that this appeal deserves to be dismissed.

6. The complainant has examined himself as witness No.1. Witness Nos. 3, 4 and 5 are the Bank witnesses and witness No.2 Anil Namdeo Gatti is an employee of the complainant. The deposition of witness No.2 is not of any importance as he was not personally acquainted with the facts of the case. In the present case it is seen that it has not been proved that the accused have been served with the notice. The complainant is unable to say whether the signature appearing on postal acknowledgement belongs to that of the accused. The second ground on which the learned Magistrate has acquitted the respondents is that when the partnership firm is to be made as accused in a criminal case, it must be represented by its partner. The complainant however, had not made partners of the firm party to the complaint. Description of accused No.1

therefore, is not correct. Hence, merely firm by name M/s. Parag Dresses cannot be prosecuted for an offence under Section 138 of Negotiable Instruments Act. Accused No.1 in the present form of description cannot be convicted and made liable for punishment under the provisions of Section 138 of Negotiable Instruments Act even if the Court comes to the conclusion that such offence has been committed by the firm.

7. The accused No.2, however, has been described as partner and owner as described in Marathi in the complaint. However, it is clear from the record that accused No.2 is not a partner of the firm. This position has emerged from the deposition of witness No.5 Dilip Mule. As per the evidence of this witness there are only four partners in the firm of M/s. Parag Dresses, they are;-

i) Praful B. Shaha,
ii) Mrs. Rajani Prakash Shaha,
iii) Mrs. Sunanda Bipin Shaha and
iv) Mrs. Jayashree Rajendra Shaha

. Thus, it is clear that the accused No.2 is not the partner of the said firm, hence, he cannot be held liable for the act of the firm. If the offence is committed by the firm the partners would

be liable. It is clear that the accused No.2 is not a partner of the said firm. There is nothing on record to show that he was in charge of or was responsible for the conduct of the business of the firm. The complainant has not stated anywhere that accused No.2 has signed cheques in question on behalf of the firm or as an agent of the said firm. In the present case, there is no reliable material on record to come to the conclusion that the accused No.2 had indeed signed the cheques. Moreover, there is no reliable material to show that the notice was indeed served on the accused.

8. Apart from this, the fact cannot be lost sight of that the impugned order of acquittal was passed on 3.5.95 and almost nine and half years have elapsed since then. In such case, I am of the opinion that in petty cases like the instant one wherein an amount of Rs.5,000/- is involved on account of efflux of time also, it would not be proper to disturb the order of acquittal.

9. Looking to the material on record it cannot be said that the view taken by the learned Magistrate was not a reasonable or possible view. It is well settled that if the view of acquittal could have been reasonably arrived at, then the mere circumstance that the appellate Court could have

taken a different view would be no ground to interfere. In this connection, there is no dearth of authorities but to eschew prolixity, I am only referring to one of them i.e. in the case of **Khedu Mohton and Ors. Vs. State of Bihar reported in AIR 1971 SC 66**. In the case of **C. Antony Vs. K.G. Raghavan Nair reported in (2003) 1 SCC 1.** which case is also under the Negotiable Instruments Act, the Supreme Court has observed that unless the finding of the appellate Court are perverse or contrary to the material on record, the High Court cannot, in appeal, substitute its finding merely because another contrary opinion was possible on the basis of material on record. In the present case, looking to the evidence on record, it cannot be said that the finding of the trial court is perverse or contrary to the material on record.

10. In view of the above, I find no merit in this appeal and the same is dismissed.